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2550 M Street, NW
Washington, DC 20037
202-457-6000

Facsimile 202-457-6315
www.pattonboggs.com

May 4, 2012

William J. McGinley
202-457-6561
wmcginley@pattonboggs.com

VIA HAND DELIVERY

Jeff S. Jordan, Esquire
Supervisory Attorney
Office of the General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

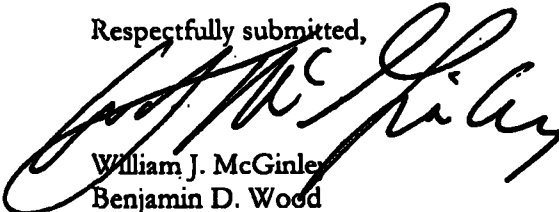
Re: MUR 6538
Americans for Job Security
and Stephen DeMaura, as Treasurer

Dear Mr. Jordan:

Please find attached the response of our clients, Americans for Job Security and Stephen DeMaura, as Treasurer, to the notification they received from the Federal Election Commission that a complaint had been filed against them in the above-referenced matter. Please note that this response includes an analysis of each electioneering communication referenced in the complaint and supporting documentation, and for ease of reference those attachments bear Bates labels AJS000001 through AJS001296.

Please do not hesitate to contact us with any questions.

Respectfully submitted,


William J. McGinley
Benjamin D. Wood

Attachments

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FEDERAL ELECTION
COMMISSION
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OFFICE OF GENERAL
COUNSEL

BEFORE THE FEDERAL ELECTION COMMISSION RECEIVED

In the matter of)
) MUR 6538
Americans for Job Security)
And Stephen DeMaura, as Treasurer)

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RESPONSE OF AMERICANS FOR JOB SECURITY
AND STEPHEN DEMAURA, AS TREASURER TO THE COMPLAINT
FILED BY CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON

I. INTRODUCTION

This responds to the notification by the Federal Election Commission ("Commission") of a complaint filed against our clients, Americans for Job Security ("AJS") and Stephen DeMaura, as Treasurer (collectively "Respondents"), by Citizens for Responsibility and Ethics in Washington ("CREW") in the above-referenced matter.¹ CREW's complaint is the latest installment in a series of harassment complaints filed against the Respondents by groups who oppose AJS's pro-growth, pro-paycheck policy positions.² For the reasons set forth below, the complaint has no merit and the Commission should find no reason to believe that the Respondents violated the Federal Election Campaign Act of 1971, as amended (the "Act"), or Commission regulations, dismiss the matter, and take no further action.

Put simply, AJS is not a political committee. Established in 1997, AJS uses paid media to promote its economic policy positions. AJS specifically and generally denies each allegation made in the Complaint. The Office of the General Counsel ("OGC") must apply a fair and objective review of AJS's communications, applying the legal standards established by the federal courts and

¹ In the wake of the Supreme Court's holding in *Citizens United v. FEC*, 558 U.S. ____; 130 S. Ct. 876 (2010), nonprofit corporations such as AJS are permitted to sponsor independent expenditures and electioneering communications.

² It also is the height of hypocrisy for CREW to file a disclosure complaint against an organization like AJS since CREW, one of the most partisan organizations in Washington, D.C., refuses to disclose its donors.

Commission regulations and precedents in effect at the time the communications were distributed.

If applied objectively, this process will result in findings that:

- AJS's major purpose, consistent with its I.R.C. § 501(c)(6) tax status, is educating the public on policy positions and encouraging the public to urge legislators — or other government officials or public figures — to support policies consistent with AJS's pro-job, pro-growth agenda. Such educational efforts and other "grassroots lobbying" are standard fare for trade associations such as AJS and constitute the organization's major purpose. In 2010, AJS engaged in a limited amount of independent expenditures for the first time since its establishment more than fourteen years ago. When compared with AJS's far more substantial issue advocacy efforts discussing pertinent economic public policy issues during the organization's history, the relatively meager amount spent on independent expenditures in 2010 constitutes a very minor portion of the organization's overall activities. In fact, even if the independent expenditures are compared to AJS's issue advocacy work for 2010 alone, the independent expenditures constitute only a minor portion of AJS's total resources. Therefore, there is no factual or legal basis for asserting that AJS's major purpose is federal campaign activity as alleged in the Complaint.
- No AJS electioneering communication contains express advocacy as defined by either 11 C.F.R. §§ 100.22(a) or 100.22(b). Nor do they constitute the functional equivalent of express advocacy under the test established by the United States Supreme Court in Wisconsin Right to Life, Inc. v. FEC. In fact, the complaint does not allege that *any* of AJS's electioneering communications contain express advocacy. Therefore, each issue ad identified in the complaint constitutes an issue advocacy advertisement protected by the First Amendment and cannot be mischaracterized as campaign activity in an effort to mislabel AJS as a political committee.
- The Complaint does not allege that AJS received any contributions as a result of communications with AJS's members or potential members under FEC v. Survival Education Fund, Inc.

Accordingly, AJS did not fail to report as a political committee with the Commission because it simply is *not* a political committee. For the reasons set forth below, the Commission must find no reason to believe, dismiss this matter and close the file.

II. FACTUAL BACKGROUND

As the records in previous harassment complaints filed against AJS in MURs 5694 and 5910 demonstrate, AJS is an incorporated nonprofit trade association organized pursuant to I.R.C.

§ 501(c)(6)³ with the mission of enhancing the climate for American businesses. Chief among AJS's goals is educating the public on issues of importance to businesses and encouraging a strong job-creating economy that promotes a pro-growth agenda. Even today, AJS's core mission remains the promotion of pro-growth, pro-jobs economic messages. See Attachment 2 (AJS Website). As stated on the organization's website: "From the beginning our message has been a simple one: free markets and pro-paycheck public policy are fundamental to building a strong economy and creating more and better paying jobs." See Attachment 2.

AJS has relied since its inception on broadcast and print advertising and mass mail to inform the public about issues and legislation important to the association and to urge the public to contact their legislators and other public leaders to support legislation favorable to American businesses. Discussed below are a few representative examples of the economic issue advocacy communications and activities that AJS has engaged in since its establishment. Please bear in mind that this is not an exhaustive list.

For example, in 2004, AJS produced a series of print advertisements critical of Republican Senator Don Nickles' stand on a tax issue because he did not do more to repeal the death tax. The advertisements encouraged the public to contact Senator Nickles and urge him to solidify his legacy and "kill the Death Tax."

In 2005, AJS continued its campaign to raise awareness about the death tax. AJS produced a series of broadcast and print advocacy pieces that criticized Senate leadership on the basis of issue positions — namely then-Majority Leader Bill Frist, Senator Jon Kyl (who had been selected by the White House to shepherd the legislation), and then-Senator Rick Santorum — for failing to bring legislation that would repeal the death tax to the Senate floor for a vote, despite their public

³ I.R.C. § 501(c)(6) accords tax-exempt status to "[b]usiness leagues . . . not organized for profit." In order to qualify under § 501(c)(6), an organization must be "an association of persons having some common business interest, the purpose of which is to promote such common interest. . . ." 26 C.F.R. § 1.501(c)(6)-1.

promises to repeal the death tax. AJS also aired radio advertisements in states represented by key Democratic Senators, including Arkansas (Sen. Pryor), Indiana (Sen. Bayh), Louisiana (Sen. Landrieu), Montana (Sen. Baucus), and Oregon (Sen. Wyden). Each advertisement noted that the particular Senator's vote would be crucial to passage of legislation to repeal the death tax, and encouraged listeners to contact the Senator's office to ask the Senator to support such legislation. None of these communications were aired within 60 days of a general election or 30 days of a primary election, and none contained any electoral component.

In addition, AJS sponsored a series of television communications concerning the legislation to establish the asbestos trust fund in early 2006. The purpose of the advertisements was to generate opposition to the asbestos trust fund legislation that was being considered by the United States Senate. The communications criticized the policy positions of Republican Senators supporting the legislation, and praised the policy positions of Democratic Senators opposing the legislation. Part of this effort involved communications that were distributed in the following states criticizing the asbestos trust fund policy positions of the following Republican Senators: Alabama (Sen. Sessions), Arizona (Sen. Kyl), Idaho (Sens. Craig and Crapo), Kentucky (Sens. Bunning and McConnell), Mississippi (Sen. Lott), Montana (Sen. Burns), New Hampshire (Sens. Gregg and Sununu), Oklahoma (Sen. Coburn), South Dakota (Sen. Thune), Utah (Sens. Bennett and Hatch), and Wyoming (Sens. Enzi and Thomas). The advertisements that were distributed in North Dakota, on the other hand, praised the public policy positions of Senators Kent Conrad and Byron Dorgan for opposing the asbestos trust legislation and fighting for small businesses and the jobs they create. None of the AJS asbestos trust fund communications aired within 30 days of a primary election or 60 days of the general election, nor did they contain any language expressly advocating the election or defeat of any federal candidate.

Since its establishment more than fourteen years ago, AJS has spent over \$50,000,000 promoting its public policy agenda through issue advocacy activities and communications. AJS did not air any electioneering communications, as defined by the Act and Commission regulations, until 2008 – after more than ten years of existence pursuing its economic issue advocacy activities. See Attachment 3B (AJS Reporting Page for Electioneering Communications). Moreover, AJS did not air an independent expenditure until 2010 and, even then, it only engaged in a limited amount of such advertising. See Attachment 3C (AJS FEC Reporting Page for Independent Expenditures). When compared to the organization's established history of engaging in substantial economic issue advocacy, the relatively minor amount of resources spent on independent expenditures in 2010 constitutes approximately 9.5% of AJS's activities since its inception. In fact, contrary to the misleading (and legally and factually erroneous) Complaint in this matter, AJS's 2010 independent expenditures constitute only 39.5% of the group's activities in that calendar year.

III. FACTUAL AND LEGAL ANALYSIS

The Act and Commission regulations define a “political committee” as “any committee, club, association or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year.” 2 U.S.C. § 431(4)(A); 11 C.F.R. § 100.5. In Buckley v. Valeo, the United States Supreme Court construed the term “political committee” to encompass only organizations that are “under the control of a candidate or the major purpose of which is the nomination or election of a candidate.” Buckley, 424 U.S. 1, 79 (1976). The Supreme Court expressed its concern that the definitions of “contribution” and “expenditure” must be narrowly construed so that they do not encompass “both issue discussion and advocacy of political result,” thereby chilling the activities of issue advocacy groups. Id. In fact, the footnote accompanying this passage refers only to footnote

52 in the opinion – the footnote that provides for the so-called “magic words” express advocacy test. See id. at 80 n. 108.

Moreover, the Supreme Court acknowledged that many groups engaging in express advocacy communications will not satisfy the definition of political committee and will merely be required to satisfy the independent expenditure reporting requirements. Id. at 79-80 (“But when the maker of the expenditure is not within these categories — when it is an individual other than a candidate or a group other than a ‘political committee’ — the relation of the information sought to the purposes of the Act may be too remote. To ensure that the reach of § 434(e) is not impermissibly broad, we construe ‘expenditure’ for the purposes of that section in the same way we construed the terms of § 608(e) — to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.”) (footnote omitted); FEC v. Mass. Citizens for Life, 479 U.S. 238, 262 (1986) [hereinafter MCFL] (“The state interest in disclosure therefore can be met in a manner less restrictive than imposing the full panoply of regulations that accompany status as a political committee under the Act”).

A. The Commission’s approach to determining whether an organization’s major purpose is the nomination or election of a federal candidate must be objective and is limited to express advocacy communications and activities under the Supreme Court’s holding in Buckley v. Valco.

In determining whether an organization constitutes a political committee, the Commission uses a case-by-case approach outlined in its supplemental Explanation & Justification.⁴ This

⁴ The Commission’s use of a case-by-case approach to determine political committee status raises substantial due process concerns in the present case since AJS is a nonprofit I.R.C. § 501(c)(6) organization that seeks to drive its public policy messages through communications to the general public that urge the recipients, listeners or viewers to contact the referenced government officials or public figures. AJS is not a political organization under I.R.C. § 527. Therefore, the Commission’s admonition in its political committee status Supplemental Explanation and Justification that the regulated community should look to the 527 political committee enforcement actions to understand the contours of its policies provides no guidance or fair notice to an organization such as AJS. See Buckley, 424 U.S. at 41 n. 48 (“[V]ague laws may not only trap the innocent by not providing fair warning or foster arbitrary and discriminatory application but also operate to inhibit protected expression by inducing citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.”) (alteration in original) (citations and internal quotation marks omitted); Shays v. FEC, 424 F. Supp. 2d 100, 115 (D.D.C. 2006) (“The Court is troubled, however, by

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under the Act.⁵ See GOPAC, 917 F.Supp. at 861 (“On its own terms, the Commission’s plea for a broadening of the Buckley concept cannot prevail under the existing authority applicable to the facts of this case. . . . Confining the definition of ‘political committee’ to an organization whose major purpose is the election of a particular federal candidate or candidates provides an appropriate ‘bright-line’ rule; attempting to determine what is an ‘issue advocacy’ group versus an ‘electoral politics’ group—as the Commission proposes—does not.”). In sum, the Commission must adhere to the constitutional boundaries limiting the application of the Act’s political committee status definition.

Even the Commission acknowledged that electioneering communications are not expenditures. The Commission explicitly stated “Congress did not amend the definition of expenditure in BCRA, and in fact, specified that ‘electioneering communications’ are not expenditures under the Act. 72 Fed. Reg. at 5597. The Commission explained:

Accordingly, while BCRA, as interpreted by McConnell, did not extend Buckley’s express advocacy limitation to the regulation of “electioneering communications,” it also did not alter that limitation as to expenditures on communications made independently of a candidate. Absent future Congressional action altering the definition of “expenditure,” the Supreme Court’s limitation of expenditures on communications made independently of a candidate, to “express advocacy” continues to apply. Therefore, determining political committee status under FECA, as modified by the Supreme Court, requires an analysis of both an organization’s specific conduct — whether it received \$1,000 in contributions or made \$1,000 in expenditures — as well as its overall conduct — whether its major purpose is Federal campaign activity (i.e., the nomination or election of a Federal candidate.).

Id. (emphasis added). Buckley held that independent expenditures are limited to communications meeting its magic words test. See Buckley, 424 U.S. at 80 n. 108. As explained more fully below in

⁵ The Commission’s analysis further tends to import ideas and standards applicable to political parties to determine major purpose status, a practice that the D.C. Circuit’s decision in EMILY’s List v. FEC rejected. See EMILY’s List v. FEC, 581 F.3d 1, 14 (D.C. Cir. 2009) (reasoning since “non-profit groups do not have the same inherent relationship with federal candidates and officeholders that political parties do, . . . it will not work to simply transport McConnell’s holding from the political party context to the non-profit setting. On this question as well, we agree with Judge Wilkinson: ‘It is . . . not an exaggeration to say that McConnell views political parties as different in kind than independent expenditure committees.’”) (second alteration in original) (quoting N.C. Right to Life, Inc. v. Leake, 525 F.3d 274, 293 (2008)).

Section D, the Supreme Court's holdings and the Commission's regulations specifically provide that permissible electioneering communications, which by definition do not contain express advocacy, constitute genuine issue ads deserving the fullest First Amendment protections and do *not* count as "campaign activity" or any other vague label that may be used to unconstitutionally expand the reach of the Act's political committee definition. FEC v. Wisconsin Right to Life, 551 U.S. 449, 127 S. Ct. 2652, 2667 (2007) [hereinafter WRTL II] ("Issue advocacy conveys information and educates. An issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose – uninvited by the ad – to factor it into their voting decisions."). Thus, electioneering communications do not count toward determining whether an organization constitutes a political committee under the Act and Commission regulations. WRTL II, 127 S. Ct. at 2659 ("We have long recognized that the distinction between campaign advocacy and issue advocacy 'may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and government actions.'"). Therefore, AJS's permissible electioneering communications may *not* be counted towards satisfying the major purpose test.

B. The Commission's flawed case-by-case, subjective major purpose test constitutes an intent-and-effect test that is barred by recent Supreme Court precedent.

To be clear, the major purpose test established by the Supreme Court is simple and objective.⁶ It is not an intent-and-effect or subjective test, requiring intrusive discovery that chills

⁶ In Citizens United, the Supreme Court criticized Commission rules and precedent that are unduly complicated and vague. See Citizens United, 130 S. Ct. at 895-96. The Supreme Court's criticisms apply with particular force to the Commission's complicated and vague case-by-case political committee status enforcement policy that provides no fair notice to issue advocacy groups concerning which activities may trigger political committee status. As the Supreme Court stated with respect to the electioneering communication rules adopted after the Supreme Court's WRTL II holding:

[T]he FEC has created a regime that allows it to select what political speech is safe for public consumption by applying ambiguous tests. If parties want to avoid litigation and the possibility of civil and criminal penalties, they must either refrain from speaking or ask the FEC to issue an advisory opinion approving the political speech in question. Government officials pore over each word of a text to see if, in their judgment, it accords with the 11-factor test they have promulgated. This is an unprecedented governmental intervention into the realm of speech.

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First Amendment activities. The Commission's flawed case-by-case, fact-intensive analysis of a group's activities to determine major purpose certainly is not mandated by the Supreme Court's holdings in Buckley and MCFL. "Those cases . . . in no way compel that conclusion. Buckley established the major purpose test, but did not describe its application in any fashion." Shays v. FEC, 511 F. Supp. 2d 19, 29 (D.D.C. 2007). Indeed, the Commission's fact-intensive analysis to determine major purpose, which is nothing more than a subjective intent-and-effect test, is constitutionally suspect after the Supreme Court's holding in WRTL II. Id. at 2666 ("No reasonable speaker would choose to run an ad covered by BCRA if its only defense to a criminal prosecution would be that its motives were pure. An intent-based standard 'blankets with uncertainty whatever may be said,' and 'offers no security for free discussion.'").

WRTL II thus precludes the Commission from engaging in unwarranted, open-ended discovery in the present MUR that would deplete the Respondent's resources and chill its First Amendment rights and activities. Id. at 2666 n.5. The Court specifically singled out the discovery practices employed by the Commission and intervenors in WRTL II for criticism as a "severe burden on political speech." Id. Any discovery by the Commission must be tailored to determine whether a communication in express terms constitutes an appeal to vote for or against a specific federal candidate — a determination that can be made *solely* from a plain, objective review of the communications themselves. Id. at 2666. Any Commission request for documents or depositions that concern contextual factors or background information about the Respondents' communications and activities would be unconstitutional under WRTL II. See id. at 2669 ("... the need to consider such background should not become an excuse for discovery or a broader inquiry of the sort we

Id. at 896. If the Commission's electioneering communications rules are too complicated and vague resulting in a practical prior restraint on political speech, the Commission's case-by-case political committee status policy fares far worse since no issue advocacy organization can glean what activities or volume of activity will result in being labeled a political committee as judged, after the fact, by six government officials or "censors." See id. at 895-96.

have just noted raises serious First Amendment concerns.”). Therefore, the Court’s reasoning in WRTL II undermines the Commission’s decision to pursue political committee status matters on a case-by-case basis through extensive, costly, and chilling discovery. See id. at 2672 (“Enough is enough.”).

- C. **AJS’s activities and communications clearly demonstrate that its major purpose is *not* the nomination or election of a federal candidate or group of candidates. AJS’s major purpose is promoting pro-growth, pro-paycheck economic policies that it believes will improve the economy and create jobs.**

AJS is a I.R.C. § 501(c)(6) entity and not a political organization. As stated in its articles of incorporation, AJS is an incorporated trade association organized pursuant to section 501(c)(6) of the Internal Revenue Code for the purpose of uniting “in a common organization businesses, business leaders, entrepreneurs, and associations of businesses” and to “promote the common business interests of its members . . . by helping the American public to better understand public policy issues of interest to business.” The IRS audited AJS in 2004, and elected to take no further action challenging its status under I.R.C. § 501(c)(6). Despite frivolous challenges by CREW and others intent on misusing government enforcement processes to intimidate and chill AJS’s First Amendment Rights, AJS continues to maintain its tax exempt status as a nonprofit trade association in good standing.

Contrary to the unfounded allegations in the Complaint, AJS’s major purpose is not the “nomination or election of federal candidates.” Complaint at ¶ 37. As explained above, AJS’s messages are focused on educating the public on policy positions and encouraging the public to urge legislators — or other government officials — to support policies consistent with AJS’s pro-job, pro-growth agenda. Such educational efforts and other “grassroots lobbying” are standard fare for trade associations such as AJS. The Commission should not mischaracterize AJS’s legitimate issue-advocacy as expenditures through a process of after-the-fact subjective tests.

When AJS only recently began exercising its First Amendment right to air electioneering communications in 2008, it did so fully in compliance with FEC regulations on such communications. In 2010, AJS aired its first independent expenditure, again in compliance with all FEC regulations governing independent expenditures. During the 2010 cycle, AJS engaged only in a limited amount of such independent expenditure advertising compared to the organization's long-established history of engaging in economic issue advocacy. When compared to the total resources AJS has spent on issue advocacy since its establishment, the independent expenditures made in 2010 constitute only approximately 9.5% of AJS's total activities. Even when compared to AJS's calendar year 2010 activities, the independent expenditures only account for 39.5% of its activities.

D. Each AJS electioneering communication identified in the complaint is a permissible electioneering communication protected by the First Amendment and does not constitute activity in connection with the nomination or election of a federal candidate or group of candidates, and thus cannot be considered "expenditures" in the major purpose test analysis.

Under Buckley, only communications that in express terms advocate the election or defeat of a clearly identified candidate or group of candidates are considered “expenditures” subject to regulation under the Act by the Commission. 424 U.S. at 44 n. 52; 11 C.F.R. § 100.22(a). This bright line test has been repeatedly upheld by the Supreme Court and other federal courts. See, e.g., MCFL, 479 U.S. at 249 (reaffirming the Buckley express advocacy standard for determining whether a communication constitutes an “expenditure”); Maine Right to Life Comm., Inc. v. FEC, 98 F.3d 1 (1st Cir. 1996) (affirming district court ruling invalidating section 100.22(b) because it impermissibly chills political speech).

BCRA did not eliminate the “express advocacy” requirement for expenditures on communications made independently of federal candidates. 72 Fed. Reg. at 5597. In McConnell v. FEC, the United States Supreme Court did not change the “express advocacy” requirement.⁷ 540

7. In fact, the Fifth Circuit noted:

U.S. 93 (2003); see also SpeechNow.org v. FEC, 599 F.3d 686, 689 n. 1 (D.C. Cir. 2010). In fact, several federal circuit courts of appeal have held that the “express advocacy” requirement survived McConnell intact in cases involving state statutes. See, e.g., Anderson v. Spear, 356 F.3d 651, 664-65 (6th Cir. 2004) (noting McConnell “left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and overbreadth in statutes which regulate more speech than that for which the legislature has established a significant governmental interest.”); Ctr. for Individual Freedom v. Carmouche, 449 F.3d 655 (5th Cir. 2006), cert. denied, 549 U.S. 1112 (2007) (“McConnell does not obviate the applicability of Buckley’s line-drawing exercise where, as in this case, we are confronted with a vague statute.”).

1. No AJS electioneering communication identified in the Complaint constitutes express advocacy under 11 C.F.R. §§ 100.22(a) or (b).
 - (a) The AJS electioneering communications listed in complaint do not constitute “express advocacy” under 11 C.F.R. § 100.22(a) and, therefore, do not qualify as expenditures under the Act or Commission Regulations.

In the present matter, none of the AJS electioneering communications listed in the Complaint expressly call for the election or defeat of any federal candidate. None of the communications instruct recipients to “vote for,” “re-elect,” “support,” “defeat,” or otherwise take any electoral action with respect to any federal candidate. Rather, the consistent message in each of

We are aware of the McConnell Court’s assertions that “the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad,” that “Buckley’s magic-words requirement is functionally meaningless,” and that “Buckley’s express advocacy line . . . has not aided the legislative effort to combat real or apparent corruption.” Those statements, however, were made in the context of the Court’s determination that a distinction between express advocacy and issue advocacy is not constitutionally mandated. The Court said nothing about the continuing relevance of the magic words requirement as a tool of statutory construction where a court is dealing with a vague campaign finance regulation.

In light of this silence, we must assume that Buckley remains good law in such circumstances.

Ctr. for Individual Freedom v. Carmouche, 449 F.3d 655, 666 n. 7 (5th Cir. 2006) (alteration in original) (citations omitted). Therefore, any notion that the Commission can enforce a regulation that goes beyond Buckley’s magic words construction is incorrect.

the electioneering communications is for the viewer, listener, or recipient to contact the identified public official or public figure to express their views on the issues discussed in the communication. Clearly, none of the AJS electioneering communications identified in the complaint constitute express advocacy under Buckley's test, or as codified in 11 C.F.R. § 100.22(a).

- (b) Since each AJS electioneering communication identified in the complaint contains an explicit request that the public contact the identified public official or public figure concerning the issues discussed in the communications, none of the communications constitute express advocacy under 11 C.F.R. § 100.22(b).

11 C.F.R. § 100.22(b) suggests, notwithstanding the commands of Buckley, that in the absence of explicit words advocating the election or defeat of a clearly identified federal candidate, a communication may also be a form of express advocacy when, taken as a whole and with limited reference to external events, it can only be interpreted by a reasonable person as unmistakably and unambiguously suggestive of only one meaning that advocates the election or defeat of one or more clearly identified candidate(s).⁸ See id.

The Commission's Explanation & Justification ("E&J") for section 100.22(b) provides a further explanation concerning what types of communications will be considered express advocacy under the expanded definition. See 60 Fed. Reg. 35292 (July 6, 1995). "Communications discussing or commenting on a candidate's character, qualifications, or accomplishments are considered express advocacy under new section 100.22(b) if, in context, they have no other reasonable meaning than to encourage actions to elect or defeat the candidate in question." Id. at 35295 (emphasis

⁸ At least three federal courts have held that section 100.22(b) is invalid and unenforceable. See, e.g., Maine Right to Life Comm., Inc. v. FEC, 98 F.3d 1 (1st Cir. 1996); Virginia Soc'y for Human Life, Inc. v. FEC, 263 F.3d 379, 392 (4th Cir. 2001); Right to Life of Dutchess Cnty. v. FEC, 6 F. Supp. 2d 248 (S.D.N.Y. 1998). In addition, several federal courts have held after McConnell that the express advocacy standard established in Buckley continues to limit the reach of vague campaign finance statutes. See Ctr. for Individual Freedom, *supra* note 7. Accordingly, McConnell did not resurrect section 100.22(b) from constitutional infirmity and the Commission should not use it as a basis for making a reason to believe finding against Respondents. Nonetheless, for argument only, we will analyze AJS's communications under section 100.22(b) in this Response. This analysis, however, must not be interpreted or construed as a waiver of our position that section 100.22(b) remains unconstitutional, as held in the federal court decisions cited above.

added). However, this standard applies only when a communication contains "no specific call to take action on any issue or to vote for a candidate. . . ." *Id.* (emphasis added). Communications containing a non-electoral call to action such as contacting the individual identified in the communication must be analyzed under a four-corners reading of the communication for the action urged.⁹

Thus, section 100.22(b) emphasizes that "the electoral portion of the communication must be unmistakable, unambiguous, and suggestive of only one meaning, and reasonable minds could not differ as to whether it encourages election or defeat of candidates or some other type of non-election action." *Id.* (emphasis added). Therefore, an express advocacy communication must contain a message that constitutes an unmistakable, unambiguous request for some type of electoral action concerning the election or defeat of a candidate.¹⁰

⁹ The resurgence of the Commission's use of section 100.22(b) in the 2004 527 MURs was explained in the General Counsel's Report #2 in MUR 5024R ("MUR 5024R OGC II"). The OGC opined that only a tiny fraction of communications will be deemed regulable under section 100.22(b):

By its very terms, section 100.22(b) is a carefully tailored provision, and everything that the Supreme Court stated in *McConnell* about the nature and limitations of express advocacy applies to section 100.22(b). Indeed, many communications will fall outside the scope of the regulation, from genuine issue ads that urge viewers to contact their representatives and urge them to vote against a certain bill, to 'sham' issue ads that appear the day before an election criticizing a candidate's position on an issue. As long as the communication can be reasonably interpreted to call for an action other than voting against a candidate — such as urging a candidate to change his or her position on an issue — the ads will not pass muster as express advocacy under section 100.22(b).

Id. at 9 (emphasis added). As demonstrated by the 2004 527 MURs, however, in fact the OGC did not so limit the scope of section 100.22(b) when pursuing respondents engaged in constitutionally protected issue advocacy. However, in the wake of *WRTL II*, the OGC and Commission undeniably are cabined by the First Amendment and may no longer use context or other open-ended factors as vehicles to characterize a genuine issue ad as express advocacy when such a characterization is not supported by a four-corners analysis of the ad itself. See *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 284 (4th Cir. 2008) ("This sort of ad hoc, totality of the circumstances-based approach provides neither fair warning to speakers that their speech will be regulated nor sufficient direction to regulators as to what constitutes political speech.").

¹⁰ The American Heritage Dictionary defines "unmistakable" as "impossible to mistake or misinterpret; obvious." The American Heritage of the English Language, Fifth Edition (2011), <http://ahdictionary.com/word/search.html?q=unmistakable> (accessed May 3, 2012). "Unambiguous" is defined as "having or exhibiting no ambiguity or uncertainty; clear." <http://ahdictionary.com/word/search.html?q=unambiguous> (accessed May 3, 2012).

Any non-electoral request for action, such as calling the government official or public figure referenced in the communication, is — at the very least — susceptible to more than one meaning under section 100.22(b)'s reasonableness standard.¹¹ Moreover, since the electoral portion must be unmistakable, unambiguous, and suggestive of only one meaning, any doubt concerning the meaning of a phrase or word must be resolved in favor of finding no express advocacy. As the Ninth Circuit held in FEC v. Furgatch:

[S]peech may only be termed "advocacy" if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated. Speech cannot be "express advocacy of the election or defeat of a clearly identified candidate" when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action. We emphasize that if any reasonable alternative reading of speech can be suggested, it cannot be express advocacy subject to the Act's disclosure requirements.

807 F.2d 857, 864 (9th Cir. 1987) (emphasis added). Therefore, if a communication contains an explicit call to take some type of non-electoral action, the Commission cannot supply a meaning to the words that is incompatible with the clear import of the words. See id. at 863-64. As discussed in Attachment 4, each AJS electioneering communication discusses governmental issues and asks the listeners, viewers or recipients to contact the referenced government official or public figure and express their views — an unmistakable, unambiguous, *non*-electoral action.

2. No AJS electioneering communication identified in the Complaint constitutes the functional equivalent of express advocacy under the Supreme Court's decision in WRTL II.

¹¹ In FEC v. Furgatch, the Ninth Circuit case the Commission cites as the legal basis for 11 C.F.R. § 100.22(b), the court commands that the analysis of any communication under the case's express advocacy test must focus on the action advocated. See 807 F.2d 857, 864-65 (9th Cir. 1987) ("The pivotal question is not what the reader should prevent Jimmy Carter from doing, but what the reader should do to prevent it. The words we focus on are 'don't let him.'"). Thus, the proper focus of any express advocacy inquiry under the expanded definition must be on the command of some type of action, and not the effect or intent of the communication. Id. at 863-64 ("Our concern here is with the clarity of the communication rather than its harmful effects. . . . [C]ontext cannot supply a meaning that is incompatible with, or simply unrelated to, the clear import of the words."). As discussed below, the call to action in each AJS electioneering communication commands the recipient, listener or viewer to contact the governmental official or public figure referenced in the advertisement concerning the issues discussed in the communication. Contacting a public figure concerning an issue is an unmistakable, unambiguous, non-electoral call to action and does not satisfy the definition of express advocacy under Furgatch or section 100.22(b).

None of the AJS electioneering communications identified in the complaint exhort the public to campaign for or contribute to any federal candidate. Nor do they explicitly refer to any individual as a candidate or reference an election. Each communication discusses public policy issues, the public official or public figure's position on the issue, and asks the public to contact the person and communicate their views. As explained fully below, a communication cannot constitute even the functional equivalent of express advocacy — let alone express advocacy itself — unless the communication “is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” WRTL II at 2667. Since each AJS electioneering communication discusses governmental issues and asks the listeners, viewers or recipients to contact the referenced government official or public figure and express their views — an unmistakable, unambiguous non-electoral call to action — none of the AJS communications constitute express advocacy or even its functional equivalent.

- (a) In WRTL II, the Court articulated the functional equivalent test for broadcast communications that air within sixty days of a general election and thirty days of a primary election to determine whether they are subject to regulation under BCRA.

In WRTL II, the Court rejected the Commission's argument that the advertisements at issue were the functional equivalent of express advocacy because the Court found that the communications may be reasonably interpreted as something other than an appeal to vote for or against a particular candidate.¹² In doing so, the Court articulated the test for determining whether an advertisement constitutes the functional equivalent of express advocacy and therefore is subject to regulation under the electioneering communication provision:

¹² It is important to note that the trigger for the application of the electioneering communication provision is a reference standard and not an electoral advocacy standard. This standard is much broader than the express advocacy standard under Buckley and its progeny and, per WRTL II, much broader than the “functional equivalent” class of communications that may constitutionally be regulated under the Act. The broad sweep of the challenged electioneering communication provision makes the Court’s holding in WRTL II more salient to any express advocacy inquiry.

In light of these considerations, a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.

Id. at 2667 (emphasis added). The clear import of the Court's test is that the plain meaning of the communication's words and images must be an appeal for the recipient, viewer or listener to "vote for or against a specific candidate." The Court reaffirmed that the intent and/or effect of a communication are *not* legitimate considerations in a political committee status analysis. *Id.* at 2665. Any other action urged or appeal contained in the communication such as one asking the viewer or listener to call the public figure identified in the communication cannot support a finding of express advocacy or its functional equivalent. *Id.* at 2670 n.7 ("[W]e agree with Justice Scalia on the imperative for clarity in this area; that is why our test affords protection unless an ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.") (emphasis in original and added).

- (b) **Each AJS electioneering communication identified in the complaint does not constitute the functional equivalent of express advocacy and thus constitutes a permissible electioneering communication under post-WRTL II Commission regulations.**

In the wake of the WRTL II decision, the Commission promulgated an exemption from the Commission's electioneering communications regulations at 11 C.F.R. § 114.2. The Commission adopted a safe harbor provision with three prongs to determine whether a communication qualifies as a permissible electioneering communication. A communication is a permissible electioneering communication, and thus not the functional equivalent of express advocacy or electoral activity, if it qualifies for the safe harbor by:

- (1) Not mentioning any election, candidacy, political party, opposing candidate, or voting by the general public;
- (2) Not taking a position on the candidate's character, qualifications or fitness for office; and

(3) Focusing either on a legislative, executive or judicial matter or issue, and urging a candidate to take a particular position or action with respect to the matter or issue, or urging the public to adopt a particular position and to contact the candidate with respect to the matter or issue.

11 C.F.R. § 114.15(b). A communication that satisfies the safe harbor provision demonstrates that it is susceptible of a reasonable interpretation other than as an appeal to vote for or against a federal candidate. Each AJS electioneering communication meets all three prongs of this test. See Attachment 4.

Under 11 C.F.R. § 114.15(c), if a communication does not qualify for the safe harbor provision, it may still qualify as a permissible electioneering communication. The Commission considers two factors under the balancing test: (1) whether the communication contains any indicia of express advocacy; and (2) whether the communication has content that would support a determination that it has an interpretation other than as an appeal to vote for or against a clearly identified candidate. Id. If, on balance, the communication has an interpretation other than as an appeal to vote for or against a federal candidate, the communication constitutes a permissible electioneering communication. Id. Any doubt regarding the permissibility of the communication must be resolved in favor of permitting the communication. See § 114.15(c)(3). The only evidence the Commission may consider in conducting the balancing test is the content of the communication and limited background information such as whether the individual named in the communication is a federal candidate or whether the advertisement describes a public policy issue. See § 114.15(d).

Of particular note, the Commission specifically addressed the permissibility of legitimate issue advocacy groups such as AJS to sponsor advertisements that discuss the public policy positions of candidates for federal office. First, the Commission opined in the Explanation and Justification that the reference to an officeholder's or candidate's past voting record does not constitute taking a

position on an officeholder's candidate's character, qualifications, or fitness for office. 72 Fed. Reg. 72899, 72904 (Dec. 26, 2007). Second, section 114.15 does not limit the subject matter of genuine issue ads to pending governmental issues. *Id.* Rather, a genuine issue ad need only address a governmental issue in an effort to generate interest in the issue. *Id.* ("Instead, the new rule covers ECs that focus on any legislative, executive or judicial issue regardless of whether it is pending before one or more branches of government. This revision allows organizations to address, for example, issues that they believe should be placed on the legislative, executive or judicial agenda in the future."). Finally, the regulation specifically permits issue advocacy groups to discuss the public policy positions of candidates who are not officeholders while permitting the ad to qualify as a permissible electioneering communication. *Id.* ("Finally, the Commission agrees with those commenters who pointed out that issue advocacy groups may urge a candidate who is not a sitting officeholder to take a position on a legislative, executive or judicial issue, not because they want to advocate the candidate's election or defeat, but because they want the candidate to commit to taking action on a certain issue if the candidate is elected."). Accordingly, an objective, reasonable application of the criteria established in section 114.15 must result in a determination that each AJS electioneering communication referenced in the Complaint does not constitute either the functional equivalent of express advocacy or express advocacy. See N.C. Right to Life, 525 F.3d at 285 ("In the meantime, political speakers would be left at sea, and, worse, subject to the prospect that the State's view of the acceptability of the speaker's point of view would influence whether or not administrative enforcement action was initiated. Nothing in McConnell, WRTL II, or any First Amendment tradition that we know of forces political speakers to incur these sorts of protracted costs to ascertain nothing more than the scope of the most basic right in a democratic society — the right to engage in discussion of issues of unquestionable public importance.").

E. When analyzing AJS's electioneering communications, the Commission is precluded from engaging in burden shifting or considering contextual factors in its inquiry.

1. The Supreme Court has specifically precluded the Commission from engaging in burden shifting by inferring an electoral advocacy message in a communication that is not supported by the plain meaning of the words actually contained in the communication.

In WRTL II, the Court also held that the Commission and federal courts cannot engage in burden shifting by placing the Respondents in the position of proving that an advertisement does not constitute express advocacy or its functional equivalent. Any analysis of a communication must begin from the standpoint that the communication contains protected political speech and is not subject to regulation. WRTL II, 127 S. Ct. at 2674. The Commission bears the burden of proving that there is no other reasonable interpretation of the communication other than express advocacy or its functional equivalence. Id. at 2669 ("Discussion of issues cannot be suppressed simply because the issues may also be pertinent to an election."). In fact, any doubt concerning the meaning of a phrase or word must be resolved in favor of a finding of no express advocacy or its functional equivalent. Id. ("Where the First Amendment is implicated, the tie goes to the speaker, not the censor."); id. at 2667 ("In short, it must give the benefit of any doubt to protecting rather than stifling speech.").

In addition, the Court reasoned that the Commission and courts cannot misconstrue a non-electoral call to action in a communication as evidence of some type of "subtle" or effective express advocacy or its functional equivalent. WRTL II, 127 S. Ct. at 2667-68. In fact, the Court emphatically closed the door on this type of flawed analysis:

Rephrased a bit, the argument perversely maintains that the less an issue ad resembles express advocacy, the more likely it is to be the functional equivalent of express advocacy. This "heads I win, tails you lose" approach cannot be correct.

Id. at 2668 (emphasis in original). Each communication must be evaluated based upon a plain review of script and video. The Commission and the courts do not have the authority to create or

infer an election meaning or message where there is none in the language, or to impute an election meaning into words that contradicts the plain meaning of those words. If a communication contains a clear non-electoral call to action, the plain meaning of those words control the analysis of the communication. Id. at 2667 ("An issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose — uninvited by the ad — to factor into their voting decisions.").

2. **The Court in WRTL II also specifically bars the FEC and Federal Courts from considering contextual factors in an express advocacy inquiry.**

In WRTL II, the Commission argued that several contextual factors prove that the ads in question were the functional equivalent of express advocacy. WRTL II, 127 S. Ct. at 2668-69. The purpose of examining the contextual factors was to create evidence of WRTL's subjective intent concerning the purpose of the advertisements at issue. Specifically, the FEC argued that WRTL's other activities, the timing of the communications, and the reference to a website that contained express advocacy were relevant factors to determining whether WRTL's communications constituted express advocacy or its functional equivalent. Id. Listed below are the three factors and the Court's determination that each factor is irrelevant to an inquiry concerning whether a communication constitutes the functional equivalent of express advocacy.

* An organization's other activities: The Court reasoned that WRTL does not forfeit the right to speak on issues simply because WRTL's political action committee actively opposed one of the individuals referenced in the communication. This evidence goes to subjective intent and is irrelevant in an express advocacy inquiry. Id. at 2668.

* Timing: The Commission argued that since the communications were to be aired in close proximity to an election, not aired near actual Senate votes, and that WRTL did not run the communications after the election were evidence of an electoral intent. "To the extent this evidence goes to WRTL's subjective intent, it is again irrelevant." Id. The Court further reasoned that "a group can certainly choose to run an issue ad to coincide with public interest rather than a floor vote" and "WRTL's decision not to continue running its ads after the blackout period does not support an inference that the ads were the functional equivalent of electioneering." Id. Therefore, timing may not be considered when

determining whether a communication constitutes express advocacy or its functional equivalent.

* Reference to websites: The Commission also argued that the communications' specific and repeated reference to a website that allowed visitors to sign up for email alerts were further evidence that the communications constituted the functional equivalent of express advocacy. Some of the email alerts contained express advocacy concerning one of the individuals referenced in the communication. The Court reasoned that the use of express advocacy in other aspects of the organization's activities is "not a justification for censoring issue-related speech." Id. at 2669. "Any express advocacy on the website, already one step removed from the text of the ads themselves, certainly does not render an interpretation of the ads as genuine issue ads unreasonable." Id.

Each of the inquiries listed above — and any inquiries that go beyond the four-corners, plain meaning of the communication — can only lead to evidence of intent and effect, evidence that the Court held is irrelevant to an express advocacy or its functional equivalent inquiry:

Far from serving the values the First Amendment is meant to protect, an intent-based test would chill core political speech by opening the door to a trial on every ad within the terms of § 203, on the theory that the speaker actually intended to affect an election, no matter how compelling the indications that the ad concerned a pending legislative or policy issue. . . . It would also typically lead to a burdensome, expert-driven inquiry, with an indeterminate result. Litigation on such a standard may or may not actually predict electoral effects, but it will unquestionably chill a substantial amount of political speech.

Id. at 2665-66; see also id. at 2666 n.5 ("Such litigation constitutes a severe burden on political speech."). Indeed, the only relevant factor in an inquiry concerning express advocacy or its functional equivalent is an objective review of the communication at issue. See id. at 2669 n.7 ("[T]here generally should be no discovery or inquiry into the sort of 'contextual' factors highlighted by the FEC and intervenors. . .").

Attached to this response as Attachment 4 is an analysis of each electioneering communication identified in the complaint demonstrating that none of the advertisements constitute express advocacy or its functional equivalent under the standards discussed above. Attached to each analysis is backup documentation demonstrating that the policy issues discussed in each advertisement were pending at the time (even though pendency is not required under section 114.15). Each advertisement's analysis and its back up policy documentation are incorporated into

this response by reference. The analysis of each advertisement, or any other analysis in this response, must not be interpreted as an admission or a waiver of any constitutional claims, defenses, or any other applicable causes or action the Respondents may have in this matter. All constitutional claims, defenses and any other applicable causes of action are specifically reserved.

F. The Complaint does not allege nor cite any evidence that any AJS solicitations resulted in contributions to the organization under FEC v. Survival Education Fund or any Commission regulation.

AJS does not solicit contributions to fund its activities. Rather, AJS's funds come from member dues and assessments. CREW does not allege and the Complaintt does not cite any evidence that AJS received any contributions as a result of its financial correspondence with its members or potential members. There is no factual or legal basis for finding reason to believe that AJS has triggered the contribution path to political committee status.

In EMILY's List v. FEC, 581 F.3d 1 (D.C. Cir. 2009), the Court of Appeals held that 11 C.F.R. § 100.57 violates the First Amendment and exceeds the Commission's statutory authority under the Act. On March 19, 2010, the Commission published a notice in the Federal Register notifying the regulated community of its intent to comply with the decision of the United States Court of Appeals for the District of Columbia Circuit in EMILY's List. 75 Fed. Reg. 13223 (Mar. 19, 2010). Accordingly, 11 C.F.R. § 100.57 is no longer in effect and the Commission removed the regulation in its entirety. Id. We are aware of no public notice from the Commission in the wake of the EMILY's List decision notifying the regulated community that the Commission will continue to pursue the flawed legal theories that formed the basis for 11 C.F.R. § 100.57 after the regulation was removed in its entirety.

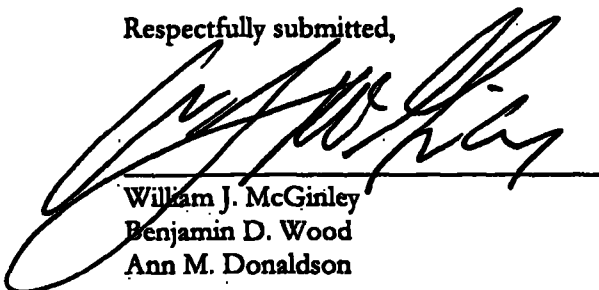
In addition, any effort to rely on FEC v. Survival Education Fund, 65 F.3d 285, 295 (2nd Cir. 1995) [hereinafter SEF], to reach the same conclusion as the regulation vacated in EMILY's List—namely, that a communication that indicates that a portion of the funds received will be used

to support or oppose the election of a clearly identified federal candidate results in a contribution—is unavailing. SEF is primarily a disclaimer case, not one that addresses the treatment of funds received in the form of membership dues by a membership organization. Any attempt to use SEF to circumvent the repeal of section 100.57 would violate due process and principles of fundamental fairness. Buckley v. Valeo, 424 U.S. 1, 77 (1976) (“Due process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal, for no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed. Where First Amendment rights are involved, an even greater degree of specificity is required.”) (citations and internal quotation marks omitted); see also Buckley, 424 U.S. at 41 n. 48 (“[V]ague laws may not only trap the innocent by not providing fair warning or foster arbitrary and discriminatory application but also operate to inhibit protected expression by inducing citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.”) (alteration in original) (citations and internal quotation marks omitted); Shays v FEC, 424 F. Supp. 2d 100, 115 (D.D.C. 2006) (“The Court is troubled, however, by FEC’s lack of explanation for its conclusion that adjudication is preferable to rulemaking for regulating 527 groups. . . . The E & J does not, for instance, discuss whether First Amendment or due process concerns might impair its ability to bring enforcement actions against 527 groups in the absence of a regulation providing clear guidance as to when those groups must register as a political committee. In fact, FECA provides a defense to ‘any person’ who relies in ‘good faith’ on FEC rules.”). Accordingly, CREW does not allege and the complaint does not cite to any evidence that AJS received any contributions as a result of its finance-related correspondence with its members or potential members, and AJS cannot be deemed a political committee on that basis.

IV. CONCLUSION

As explained fully above, there is no factual or legal basis to the allegations contained in the Complaint. Accordingly, AJS and Stephen DeMaura, as Treasurer, respectfully request that the OGC recommend, and the Commission find, that there is no reason to believe that a violation of the Act was committed in this matter, dismiss the Complaint, and take no further action.

Respectfully submitted,



William J. McGinley
Benjamin D. Wood
Ann M. Donaldson

PATTON BOGGS LLP
2550 M Street, NW
Washington, DC 20037
P: (202) 457-6000
F: (202) 457-6315

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